

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SHARMA v MINISTER FOR IMMIGRATION &
BORDER PROTECTION & ANOR*

[2015] FCCA 2669

Catchwords:

MIGRATION – Review of decision by Migration Review Tribunal – whether Migration Review Tribunal’s decision affected by jurisdictional error – whether it was open to Migration Review Tribunal to find that the applicant’s application for a visa was supported by a bogus document that was false or misleading in a material particular - whether the Migration Review Tribunal erred in finding that Public Interest Criterion 4020(1) applied to the applicant – whether the Migration Review Tribunal properly considered if the requirements of Public Interest Criterion 4020(1) should be waived on the basis of compelling circumstances affecting the interests of Australia or compelling or compassionate circumstances affecting the interests of an Australian citizen or permanent resident – whether in considering whether to waive Public Interest Criterion 4020(1) in accordance with Public Interest Criterion 4020(4) Migration Review Tribunal engaged in an active intellectual process in considering the applicant’s evidence – whether in all the circumstances it was reasonable for Migration Review Tribunal not to waive Public Interest Criterion 4020(1) – jurisdictional error – writs issued.

Legislation:

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.31, 65, 97, 338, 357A, 359A, 359AA, 360, 474

Migration Regulations 1994 (Cth), reg.2.01, Schedule 2 – 485.224, Schedule 4 – 4020

Migration Amendment Regulations 2011 (No.1) (Cth), reg.5, Schedule 3

Legislative Instruments Act 2003 (Cth), s.12

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Re Minister for Immigration and Multicultural Affairs; Ex parte

Durairajasingham (2000) 168 ALR 407

WZAQU v Minister for Immigration and Citizenship [2013] FCA 327

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Applicant:

KANCHAN SHARMA

First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 829 of 2014
Judgment of:	Judge Emmett
Hearing date:	29 September 2015
Date of Last Submission:	29 September 2015
Delivered at:	Sydney
Delivered on:	6 October 2015

REPRESENTATION

The applicant appeared in person.

Counsel for the Respondents:	Mr Mark Cleary
Solicitors for the Respondents:	DLA Piper Australia

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 829 of 2014

KANCHAN SHARMA

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

EX TEMPORE

REASONS FOR JUDGMENT

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Pt.8, Div.2 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Migration Review Tribunal dated 27 February 2014 and handed down on 28 February 2014 (“**the MRT**”).
2. Prior to considering the proceeding before this Court, these Reasons provide the relevant procedural background, the relevant legislative framework, a summary of the decision of a delegate of the first

respondent (“**the Delegate**”), and a summary of the MRT’s review and decision.

Background

3. On 18 March 2009, the applicant lodged an application for a Skilled (Provisional) (Class VC) visa with the Department of Immigration and Citizenship (“**the Department**”).
4. On 22 August 2012, the Delegate refused the applicant’s application for a skilled (provisional) visa.
5. On 10 September 2012, the applicant lodged an application for review of the Delegate’s decision by the MRT.
6. On 28 February 2014, the MRT affirmed the decision of the Delegate not to grant a skilled (provisional) visa.
7. On 27 March 2014, the applicant filed an application in this Court seeking judicial review of the MRT’s decision.

Legislative framework

8. Pursuant to s.65(1) of the Act, if satisfied of a number of matters, the first respondent may grant a visa. Section 31(1) of the Act provides that there are to be prescribed classes of visa. One class of visa is a Skilled (Provisional) (Class VC) visa (reg.2.01 of the *Migration Regulations 1994* (Cth) (“**the Regulations**”) and Schedule 1 to the Regulations).
9. At the time of the decision to grant or refuse a skilled (provisional) visa to the applicant, the applicant was required to meet the criteria in cl.485.224 of Schedule 2 to the Regulations. Relevantly, cl.485.224(a) of Schedule 2 to the Regulations required the applicant to satisfy Public Interest Criterion 4020 (“**PIC 4020**”).
10. Part 1 of Schedule 4 to the Regulations included the requirements of Public Interest Criterion 4020 (“**PIC 4020**”). PIC 4020 is as follows:
 11. “**4020**

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a

*Medical Officer of the Commonwealth, a **bogus document** or information that is false or misleading in a material particular in relation to:*

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse the application;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

12. ...

*(4) The **Minister may waive the requirements** of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:*

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is false or misleading in a material particular means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.”

Note Regulation 1.03 defines **bogus document** as having the same meaning as in section 97 of the Act.”

13. (Emphasis added.)

14. Relevantly, s.97 of the Act defines ‘bogus document’ as follows:

“bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.”

15. Under s.338 of the Act, a decision to refuse to grant a skilled (provisional) visa is a decision which may be reviewed by the second respondent.

16. The requirements of the natural justice hearing rule are exhaustively stated in Division 5 of Part 5 of the Act (s.357A of the Act). Division 5 Part 5 includes ss.359A and 360, which provide that:

“359A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the Applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

360 Tribunal must invite Applicant to appear

i)(1) The Tribunal must invite the Applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

17. Section 359AA of the Act permits the MRT to give orally to an applicant clear particulars of any information that the MRT considers would be the reason or part of the reason for affirming the decision under review. The MRT must ensure that the applicant understands the relevance of the information and the consequences of any information being relied upon. The MRT must also invite the applicant to comment

on or respond to the information and advise the applicant that the applicant may seek additional time to comment on or respond to the information.

18. Under s.474(2) of the Act, a decision of the second respondent is a 'privative clause decision'. Under s.474(1)(a) of the Act, a privative clause decision is final and conclusive.
19. However, a purported decision of the second respondent which is affected by jurisdictional error is not a decision which is made under the Act and therefore is not a privative clause decision (see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).

The Delegate's decision

20. On 22 August 2012, the Delegate refused the applicant's application for a skilled (provisional) visa on the basis that the applicant did not satisfy the requirements of PIC 4020 because she had submitted a bogus document to the Department in relation to her application for a skilled (provisional) visa.
21. Accordingly, the Delegate found that the applicant did not meet the requirements cl.485.224 of Schedule 2 to the Regulations for the grant of the visa.
22. **The MRT's review and decision**
23. On 10 September 2012, the applicant lodged an application for review of the Delegate's decision by the MRT.
24. The applicant provided no further documents in support of her review application.
25. On 22 August 2013, the MRT wrote to the applicant informing her that the MRT had considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the applicant to attend a hearing on 3 October 2013 to give oral evidence and present arguments.
- 26.

27. On 3 October 2013, the applicant attended the MRT hearing and gave evidence. At the hearing, the MRT raised with the applicant various concerns that it had about her evidence.
28. The MRT noted that it had before it the Delegate's decision record and other materials available to it from a range of sources, including copies of two work references dated 22 February 2009 and 26 May 2009 respectively ("**the work references**").
29. The MRT explored the applicant's claims with her in some detail at the hearing and put to her concerns it had about her evidence, noting her responses.
30. The MRT identified the issue before it as whether the applicant met PIC 4020 as required by cl.485.224 of Schedule 2 to the Regulations for the grant of the visa. PIC 4020(1) required that there be no evidence that the applicant had given or had caused to be given a bogus document or information that was false or misleading in a material particular in relation to the applicant's application for a visa. The MRT noted that this requirement can be waived if there are certain "*compelling or compassionate reasons justifying the grant of the visa*".
31. Ultimately, the MRT found that work references provided by the applicant to Trades Recognition Australia contained information that was false or misleading in a material particular. The work references supported the applicant's claims to have been employed as a cook at the New Bombay Fusion Restaurant for over 900 hours. The MRT found that the applicant's evidence in relation to the work references to be "*confusing, contradictory and unconvincing.*"
32. The MRT identified the "*confusing and contradictory*" aspects of the work references for the applicant in some detail and noted her responses. However, the MRT was not satisfied by the applicant's explanations and was not satisfied that she had worked as a cook at the New Bombay Fusion Restaurant for over 900 hours.
33. Accordingly, the MRT found that Trade Recognition Australia's skills assessment dated 8 July 2009 ("**the TRA**") was a bogus document within the meaning of s.97(c) of the Act.

34. The MRT then considered whether the requirements of PIC 4020 should be waived and concluded that they should not.
35. Accordingly, the MRT affirmed the decision under review.

The proceeding before this Court

36. The applicant was unrepresented before this Court. The applicant confirmed to the Court that she did not require the assistance of an interpreter.
37. The applicant confirmed that she had not filed any Amended Application, evidence or submissions in support of her application and that she had no further documents to present to the Court this morning in support of her application.
38. The applicant confirmed that she relied on the ground contained in her initiating application, filed on 27 March 2014, as follows:

“1. The Tribunal misapplied the law.

Particulars

(a) The Tribunal found the applicant provided references given by the applicant to TRA were false or misleading in a material particular and that the TRA skills assessment dated 8 July 2009 is a bogus document for the purpose of Section 97 of the Migration Act 1958 (para 40 of Decision Record).

(b) The Tribunal further found in consequence the applicant did not meet the provisions of PIC 4020(1) (para 42 of Decision Record).

(c) In applying PIC 4020(1) the Tribunal failed to consider that this Regulation is invalid as a consequence of its retrospective application, in breach of the provisions of Section 12 of the Commonwealth Legislative Instruments Act 2003.”

39. I took the applicant through the grounds of her application in some detail and confirmed with her that she had read the submissions of the first respondent. I explained to the applicant that the role of this Court was very different to that of the MRT and that it was not for this Court to reconsider her claims and that the only issue before this Court was whether or not the decision of the MRT was made according to law.

40. However, I also explained to the applicant that, if the adverse findings made by the MRT against her were not open to it on the evidence and material before it, then the MRT decision had not been made according to law.
41. I asked the applicant if she would find it helpful if counsel for the first respondent took the Court and the applicant through the MRT's decision and then addressed the technical ground raised by the applicant as to the validity of PIC 4020. The applicant said she would like the Court to proceed in that manner.
42. Counsel for the first respondent, Mr Cleary, took the Court carefully through the MRT's decision in relation to its consideration of PIC 4020.
43. As stated above, the MRT explored with the applicant in significant detail the concerns it had about the work references that she had provided in support of her assertion that she had worked 900 hours at the New Bombay Fusion Restaurant as a cook over some period of time. The MRT noted various versions of the applicant's evidence about her periods of work and the inconsistencies in the two work references with the applicant's evidence.
44. The MRT also had regard to evidence provided by the owner of the New Bombay Fusion Restaurant that a list of employees did not include the applicant. The MRT considered the applicant's explanation for that omission, being that she had argued with the owner over money and had not left on good terms. However, the MRT did not accept the applicant's explanation.
45. The finding of the MRT that the TRA was a bogus document in accordance with s.97 of the Act because it was obtained using two false or misleading work references, was open to it on the evidence and material before it and for the reasons it gave. The MRT's findings, including its adverse findings, were open to it on the evidence and material before it and for the reasons it gave. Credibility findings are a matter par excellence for the MRT (see *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67] per McHugh J).

46. In the circumstances, the MRT found that the TRA was a bogus document within the meaning of s.97(c) of the Act.
47. Accordingly, the MRT's finding that there was evidence before it that the applicant had given, or caused to be given, to the relevant assessing authority, bogus documents in the nature of two work references that were false or misleading in a material particular in relation to her application for the skilled (provisional) visa, was open to it. Such conduct by the applicant resulted in a failure by the applicant to comply with PIC 4020(1).
48. **Waiver of PIC 4020(1)**
49. Having found that there was evidence that the applicant had given, or caused to be given, a bogus document, being the TRA, which contained information that was false or misleading in material particular, the MRT considered whether it may waive the requirement of PIC 4020(1) in accordance with PIC 4020(4). In considering whether the requirements of PIC 4020(1) should be waived, the MRT stated as follows:

“Should the requirements of PIC4020 be waived?”

43. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen as defined in r.1.03.

44. For the following reasons, the Tribunal is not satisfied that the requirements should be waived. The applicant gave evidence that she has a new partner who is an Australian citizen. She gave evidence that they have been living together for a month. When asked what impact it would have on her partner if she is not granted this visa, she stated that he would not be happy. She gave evidence that he had lived alone since he was young. She stated that he had a drug problem and is now rehabilitated. She stated that as a restaurant manager at an Oporto restaurant she is able to hire and fire staff. She gave evidence that she hires people who are refugees or Australian citizens.

45. The Tribunal has considered the evidence given by the applicant, the submissions made by her migration agent and has had regard to Departmental guidelines (PAM3). When

considering whether the provisions of PIC 4020(1) should be waived under PIC 4020(4) the Tribunal must be satisfied that the circumstances referred to in PIC 4020(4) justify the granting of this visa.

46. The Tribunal is not satisfied that the applicant's circumstances amount to compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen that justify the granting of this visa. Therefore, the Tribunal has determined not to waive the requirements of PIC 4020(1)."

50. I raised with counsel for the first respondent, Mr Cleary, whether, based on the evidence before it, there was proper reasoning by the MRT that led to its conclusion that PIC 4020(1) should not be waived.
51. The concern I raised with Mr Cleary was that, although the MRT commenced its consideration of whether to waive PIC 4020 with the words *"For the following reasons, the Tribunal is not satisfied that the requirements should be waived"*, the MRT appears to have done no more than recite the evidence before it and the documents to which it had regard. The MRT then stated that it was not satisfied that the applicant's circumstances amounted to compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen or permanent resident. The MRT did not offer any reason as to why the applicant's evidence led to its conclusion that the applicant's circumstances were neither compassionate nor compelling for the purposes of PIC 4020(4).
52. Mr Cleary submitted that the Court should draw inferences from the MRT's summary of the applicant's evidence that it did not regard those circumstances as compassionate or compelling. I do not accept that submission as it involves drawing negative inferences against the applicant as opposed to the first respondent. In my view, this is not a case where it is either necessary or appropriate to draw inferences one way or the other.
53. There was no consideration by the MRT why the evidence before it, particularly of the applicant, did not satisfy the MRT that, relevantly, there were compelling circumstances that affected the interests of

Australia or compassionate or compelling circumstances that affected the interests of an Australian citizen or an Australian permanent resident. The applicant provided evidence that she may be able to assist Australian citizens in giving them jobs at her place of work, where she was the manager. It was open to the MRT to find such evidence not to be sufficient to satisfy it that PIC 4020(1) should be waived. However, it was also open to the MRT, based on the applicant's evidence, to find that PIC 4020(1) should be waived.

54. In short, the evidence of the applicant may be capable of establishing compassionate or compelling circumstances that affected the interests of Australia or an Australian citizen or permanent resident. If the MRT was to find that they did not, the MRT was required to engage in an active intellectual process of considering the applicant's evidence and give reasons for its failure to be satisfied that PIC 4020(1) should be waived (see *WZAQU v Minister for Immigration and Citizenship* [2013] FCA 327 at [12] per Flick J). To conclude that PIC 4020(1) should not be waived was, in all the circumstances, otherwise unreasonable (see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332).
55. Accordingly, the MRT's decision is affected by jurisdictional error and the matter should be remitted for determination according to law.
56. **Ground 1(c) – whether PIC 4020 is invalid**
57. The only ground of the applicant's application for judicial review contended that the MRT "*misapplied the law*" by applying PIC 4020(1) to her skilled (provisional) visa application because PIC 4020(1) was invalid. Grounds 1(a) and 1(b) were mere assertions of the MRT's findings and did not by themselves assert any error. However, for the reasons below, the contention in Ground 1(c) is not made out.
58. The *Migration Amendment Regulations 2011 (No 1)* (Cth) ("**the Amendment Regulations**") introducing PIC 4020 took effect on 24 February 2011. Schedule 3 of the Amendment Regulations amended Schedule 4 to the Regulations by inserting PIC 4020.
- 59.

60. Relevantly, reg.5(2) of the Amendment Regulations provided as follows:

“5 Amendment of Migration Regulations 1994 – Schedule 3

...

(2) The amendments made by Schedule 3 apply in relation to an application for a visa:

(a) made, but not finally determined (within the meaning of subsection 5(9) of the Migration Act 1958), before 2 April 2011; or

(b) made on or after 2 April 2011.”

61. The applicant’s application for a visa was lodged on 18 March 2009. However, it was not determined until 22 August 2012, well after 2 April 2011.
62. Section 12 of the *Legislative Instruments Act 2003* (Cth) has the effect that a legislative instrument, such as the Amendment Regulations, takes effect from the day specified in the instrument. Relevantly, reg.5(2) of the Amendment Regulations makes clear that the amendment applied in relation to an application for a visa made, but not finally determined, before 2 April 2011. This was the position of the applicant.
63. In the circumstances, the requirements of PIC 4020 applied to the applicant and the grounds of her application for judicial review are not made out insofar as they assert that PIC 4020(1) is invalid and does not apply to the applicant.
64. Accordingly, the MRT did not “*misapply the law*” in applying PIC 4020 to the applicant’s application for a visa.
65. **Conclusion**
66. By reason of the failure of the MRT to consider the applicant’s evidence as to why PIC 4020(1) should be waived, or to provide reasons for its conclusion that PIC 4020(1) should not be waived, the decision of the MRT, dated 28 February 2014, is affected by jurisdictional error.

67. The decision of the MRT should be set aside and the matter remitted to the MRT for determination according to law.

I certify that the preceding fifty-seven (57) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 6 October 2015